APPENDIX A

Syllabus

OHIO TRANSPORT, INC., APPELLANT, *v.* PUBLIC UTILITIES COMMISSION OF OHIO, APPELLEE. (TWO cases.)

Public Utilities Commission—Motor transportation companies—Certificate of public convenience and necessity—Authority to revoke, alter or amend—Section 4921.10, Revised Code—Grounds for revocation—Violation of weight and load limit statutes—Determination of degree of administrative action, duty of commission—Determination not disturbed by court, when—Evidence warranting revocation—Hearings—Disqualification of member of commission—Determination of—Testimony of witnesses—Immunity personal to witness—Revocation not "penalty or forfeiture"—Section 4903.08, Revised Code.

1. The Public Utilities Commission may for good cause and upon notice and hearing as provided by Section 4921.10, Revised Code, revoke, alter or amend any certificate or permit issued by it to a motor transportation company.

2. Such action by the commission "for good cause" may be based on a violation of the weight and load limit statutes of Ohio, irrespective of the fact that such statutes are not a part of the Motor Transportation Act and irrespective of the fact that there has been no prosecution thereunder. (*Dworkin, Inc.*, v. *Public Utilities Commission*, 159 Ohio St., 174, approved and followed.)

3. The determination of the character and degree of the administrative action to be invoked against a carrier is the duty of the Public Utilities Commission, and such determination by the commission will not be disturbed by this court unless it is unreasonable or unlawful.

4. Where it appears from the findings of fact made by the Public Utilities Commission that a contract carrier by motor vehicle hauled more than 900 shipments of steel each in excess of the maximum gross weight prescribed by law; that 210 of such overloads were hauled during one month; that many of such overloads were in excess of 84,000 pounds; that all but 8 of the 35 drivers of such carrier who were interviewed acknowledged that they had knowingly hauled overloads; and that the carrier itself had knowledge of these excessive weights and billed its consignees on the basis thereof; an order revoking said carrier's contract permit and irregular certificate is amply warranted by the evidence and is not unreasonable or unlawful.
5. The revocation of a contract carrier's permit is not a "penalty or forfeiture" within the purview of Section 4903.08, Revised Code.
6. The immunity offered by Section 4903.08, Revised Code, is personal to the witness testifying and does not extend to a corporation of which he may be an officer.
7. In the absence of legislative direction as to the circumstances under which a member of the Public Utilities Commission should disqualify himself and in the absence of statutory provisions for the determination of the fact of disqualification and the substitution of another to replace a member disqualified, the members of the Public Utilities Commission have no jurisdiction to determine the disqualification of each other by reason of alleged bias or prejudice.

(Nos. 34308 and 34309—Decided July 20, 1955.)

Appeals from the Public Utilities Commission.

Statement of the Case

Ohio Transport, Inc., hereinafter designated appellant, is an Ohio corporation having its office and principal place of

business in Cleveland, Ohio, and was at all times involved herein a contract carrier by motor vehicle in intrastate commerce in Ohio, operating under and by virtue of a contract carrier permit No. 3066 (case No. 34308) originally issued to it by the Public Utilities Commisison of Ohio on or about March 1, 1950, and an irregular intrastate certificate No. 3975 (case No. 34309).

Since the facts in each of the cases are substantially the same, and the issues involved are identical, only the facts and issues involved in case No. 34308 will be set out and discussed in this opinion, with the understanding that what is said with reference to that case is equally applicable to case No. 34309.

On September 11, 1953, the Public Utilities Commission of Ohio issued a citation against appellant wherein it is alleged that appellant "did wrongfully, illegally and unlawfully operate under authority of said permit in the following particulars during portions of the period from January 1, 1952, to August 1, 1953, to wit:

"Permitted its drivers to operate loaded motor vehicles upon the public streets and highways of the state of Ohio, the total weights of which vehicles and loads imposed upon the road surfaces were in excess of the maximum weight therefor prescribed and limited by Sections 7246 and 7248-1, General Code (Sections 5577.02 and 5577.04, Revised Code), and in violation of the rules and regulations of this commission, as evidenced by said carrier's own office records, invoices, shipping orders and/or receipts relating to the transport of the property so overloaded and which are specifically set forth and listed in exhibit 'A' attached hereto and made a part hereof as if expressly written herein."

On November 20, 1953, appellant filed a motion with the commission asking that the citation be dismissed for the reason that the commission does not have jurisdiction to revoke or suspend appellant's permit for the reasons set

forth in the citation. This motion was overruled. An application for a rehearing filed on behalf of appellant was denied, and thereafter appellant filed its answer to said citation which consists of a general denial of the charges.

On February 17, 1954, prior to the hearing before the commission on the citation, appellant filed a motion to disqualify the chairman from sitting in, presiding over, or in any manner considering evidence, making any decision or participating in the proceeding, for the reason that the chairman was prejudiced and biased against appellant as evidenced by statements to the public press concerning the proceeding prior to the hearing and trial of the issues. On February 23, 1954, a formal hearing on this motion to disqualify was conducted by members of the commission, Martin and Winter, who, following argument thereon, overruled the motion to disqualify.

At the beginning of the hearing before the attorney examiner, appellant proceeded with the approval of the examiner to proffer evidence in support of its motion to disqualify, which evidence is summarized in appellant's brief, as follows:

"Early in the summer of 1953, three disgruntled persons who had formerly driven equipment under contract to citee approached the Cleveland Press and made assertions and charges concerning citee and its operations. Among the charges made by these former drivers were those of bribery, violations of union contracts, overloading, and many other allegations of violation of law.

"On August 15, 1953, the commission ordered one of its attorney examiners to attend a meeting called by said newspaper at its offices to be attended by the three drivers, a representative of the highway patrol, and a representative of the newspaper. At this meeting, the charges which had been previously made by the drivers were discussed and the drivers examined by the attorney examiner, the representa-

tive of the highway patrol, and the representative of the Cleveland paper.

"An examination of the minutes of this meeting (citee's exhibit 5, Tr. Vol. 1) discloses that the charges previously made were without foundation; yet, despite this fact, Commissioner Moulton, on August 19, 1953, said, 'But the important point is that if the company is in violation we want to get it off the roads.' (Citee's exhibit 4, Tr. Vol. 1.)

"Again on September 11, 1953, Commissioner Moulton, indicating a presumption of guilt on the part of citee, stated to the press (citee's exhibits 1 and 3, Tr. Vol. 1), 'For the past year and a half Ohio Transport has been moving about two and a half overloads a day in and out of Cleveland'; and on the same date he was quoted in a press release as follows: 'The findings of the three-week probe are serious and of great import to the people of Ohio.'

"Again on December 30, 1953, in a press release issued by the Public Utilities Commission under the direction of the chairman and with his approval, we find the following (citee's exhibit 2, Tr. Vol. 1): 'Then along came Ohio Transport, Inc., another Cleveland trucker. The commission got complaints on this one from a Cleveland newspaper, then whipped up a new investigative technique, sent in a fleet of accountants and inspectors to go over the company's books, and found evidence of at least 1,058 alleged overloads in 19 months primarily on steel hauls between Cleveland and McDonald.' "

On June 30, 1954, the report of the attorney examiner was filed wherein he made the following findings of fact:

"(1) Citee, Ohio Transport, holds contract motor carrier permit No. 3066, from this commission.

"(2) Under that authority Ohio Transport principally transports steel for The American Steel & Wire Co. out of its plant in McDonald, Ohio, to points and places in the Cleveland area.

"(3) In this operation the citee makes very extensive use of owner-operators, who are paid a percentage of the revenue derived from the transportation.

"(4) The procedure followed by the citee in operating under its contract motor carrier permit is as follows:

"(a) An agent of Ohio Transport is located at the plant of the shipper. As loads become ready for transportation this agent summons the equipment from the terminal of Ohio Transport to come and load at the plant of the shipper.

"(b) The shipper prepares a 'shipping order' which contains various information such as: the number of the vehicles to be used, the name of the driver, the weight of the load to be transported, and other similar information.

"(c) A copy of this 'shipping order' is then given to the driver or owner-operator of the Ohio Transport, Inc., who retains said copy in his possession during transit.

"(d) When the load arrives at the point of destination the Ohio Transport driver has his 'shipping order' receipted by an agent of the consignee.

"(e) A driver or owner-operator of Ohio Transport then returns the 'shipping order' to the offices of Ohio Transport.

"(f) The Ohio Transport, Inc., then uses the 'shipping order' or the information contained thereon in computing its charges to its shippers and also in computing the payments which it makes to its owner-operators or drivers.

"(5) From an examination of these 'shipping orders' for the period of Jan. 1, 1952, to August 4, 1953, by investigators of this commission and as set forth in PUCO exhibit No. 5, which are the work sheets made by such investigator, it appears that during the period for which the investigation was conducted the records of Ohio Transport indicate that over 900 (nine hundred and twenty-six more or less) shipments were transported in excess of 78,000 lbs. These loads were each in violation of existing Ohio weight laws. Like-

wise, each such violation was also an infraction of this commission's safety rules and regulations.

"(6) The citee's overall record as to safety and general operations is good."

The attorney examiner recommended that the operating rights of the appellant be suspended for a period of not to exceed 30 days. Thereafter the commission rejected the recommendations of the attorney examiner and revoked appellant's permit.

The cause is now before this court upon appeal from the order of the Public Utilities Commission.

Opinion, Per Bell, J.

Messrs. Calland, Stauffer & Asher and *Messrs. Jenkins, Williams, Wendt, Murray & Deeg,* for appellant.

Mr. C. William O'Neill, attorney general, *Mr. Everett H. Krueger, Jr., Mr. Ralph N. Mahaffey* and *Mr. James M. Burtch, Jr.,* for appellee.

BELL, J. Although the appellant assigns 25 specifications of error, all of them are included in the following four questions presented by this appeal:

1. Did the commission have jurisdiction to revoke or suspend appellant's permit for the reasons specified in its citation order?

2. Was the penalty inflicted by the commission excessive or unreasonable?

3. Was the commission estopped from revoking or suspending the permit of appellant because of the provisions of Section 4903.08, Revised Code?

4. Did the commission err in not disqualifying the chairman from participating in this proceeding?

Section 614-105, General Code (Section 4923.03, Revised Code), reads in part as follows:

"The Public Utilities Commission of Ohio is hereby vested with power and authority to supervise and regulate each such private motor carrier in this state; to prescribe reasonable safety rules; to prescribe reasonable rules and regulations for the administration and enforcement of the provisions of this chapter applying to each such contract carrier by motor vericle in this state * * *."

Appellant contends that the jurisdiction of the Public Utilities Commission is limited by this section to only such matters as are covered by "this chapter" (the Motor Transportation Act), and that, since Sections 7246 and 7248-1, General Code (Sections 5577.01 and 5577.04, Revised Code), referred to in the citation, are not a part of "this chapter," the commission is without jurisdiction to act.

This question is not a new one in Ohio.

Section 614-87, General Code (Section 4921.10, Revised Code), reads in part as follows:

"The commission may at any time for good cause and upon at least 15 days' notice to the grantee of any certificate and [after granting] an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this chapter."

The third and fourth paragraphs of the syllabus in *Dworkin* v. *Public Utilities Commission*, 159 Ohio St., 174, 111 N. E. (2d), 389, are:

"3. Such action by the commission for 'good cause' may be based on a violation of a statute or a valid rule or order of the commission.

"4. Such action may be based on a criminal statutory violation although there may have been no prosecution thereunder."

Appellant contends that revocation of its permit was an excessive and unreasonable disciplinary action by the commission because of (1) the absence of arrest for overloading

in its operations under the permit and (2) certain "mitigating circumstances" listed by the attorney examiner in his report and recommendation.

It is, of course, the duty of the commission and not of the examiner to fix the degree and character of the administrative action to be invoked against a carrier. In its discussion of the evidence in this cause, the commission stated as follows:

"*There are no facts or circumstances in this case which can properly be regarded as being in the nature of mitigating elements.* The citee, in the judgment of the commission, has been willful and wanton in its violation. In the month of December 1952 there was *an average of seven (7) violations per day.* The average gross overload was in excess of 3,000 lbs. Under these facts and circumstances, it is impossible for the commission to conclude that such operations were the result of mere carelessness or negligence. *Such consistent regularity in violating the law over such a period of time, with full knowledge on the part of a number of citee's duly authorized agents and employees, indicates very clearly that such illegal activities were part of the day-to-day pattern of operations conducted by this company and either approved or condoned by the officers and directors.*

"* * * Certainly, just because the citee was not apprehended, prosecuted or convicted for his illegal acts *does not condone them nor does it serve as a mitigating circumstance that it was so fortunate* as not to be caught in its illegal activities.

"The commission, while acknowledging that the accident record of citee appears to be good, at least by standards commonly accepted by insurance companies, *does not believe that a company which so recklessly and regularly disregards the laws of Ohio on weight limits is carrying on a sound business operation or is a company of which it can be said that its overall operating record is good.*" (Emphasis added.)

Examination of the record upon which the commission based its order of revocation discloses that appellant hauled approximately *900* shipments of steel in excess of the maximum gross weight prescribed by law; that *210* of these overloads were hauled during December 1952 *alone*, for an average of *7* overloads *per day* or *52.5* overloads per week; that a large proportion of these overloads exceeded *84,000* pounds and *two* of them were in excess of *90,000 pounds;* that *all* but eight of citee's *35* drivers, interviewed by the highway patrol, acknowledged that they had knowingly hauled overloads during the period covered by the commission's citation (citee's exhibit No. 6); that *both* citee and citee's drivers had knowledge of these overloads; and that citee billed the consignees on the basis of these excessive weights.

In the light of these facts, this court cannot say that the action of revocation by the commission was excessive or unreasonable.

Appellant contends that the commission was estopped from revoking or suspending the permit of appellant because of the provisions of Section 614-39, General Code (Section 4903.08, Revised Code), which reads as follows:

"No person shall be excused from testifying or from producing accounts, books and papers, in any hearing before the commission, or any member thereof, or any person appointed by it to investigate any matter or thing under its jurisdiction, on the ground or for the reason that the testimony or evidence might tend to incriminate him, or subject him to a penalty or forfeiture, but no such person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying."

Appellant contends that inasmuch as the commission subpoenaed it, through its president, to appear, testify and bring various books, records, bills, orders, invoices, accounts and other papers relating to shipments, weights, etc., and that, since the president did testify in regard to those matters, the commission is estopped from taking any disciplinary action against appellant based on that testimony.

We believe, however, that this contention of the appellant is untenable for two reasons.

In the first place, Section 4903.08, Revised Code, provides that no person shall be subjected to any "penalty or forfeiture." A forfeiture has been defined as a divestiture of property without compensation in consequence of some default or act forbidden by law. 19 Ohio Jurisprudence, 204, Forfeiture and Penalties, Section 2. A penalty has been defined as a sum of money exacted by way of punishment for the doing of some act which is prohibited, or from omitting to do something which is required to be done. 19 Ohio Jurisprudence, 212, Forfeitures and Penalties, Section 15.

A certificate or permit issued to a motor transportation company is a revocable license which confers no property rights upon the holder. *Scheible, Mayor,* v. *Hogan,* 113 Ohio St., 83, 148 N. E., 581; *Alspaugh* v. *Public Utilities Commission,* 146 Ohio St., 267, 65 N .E. (2d), 263. Since the revocation of a permit or a certificate cannot therefore divest the holder of any property right, and since the payment of a sum of money is not involved, the revocation of a permit may easily be distinguished from both a penalty and a forfeiture.

In the second place, the statute provides that the *person who testifies* shall not be prosecuted or subjected to any penalty or forfeiture. In this case the person who testified was appellant's president and he is a person separate and distinct from the appellant.

Judge Hart, in the case of *In Re Bott,* 146 Ohio St., 511, 66 N. E. (2d), 918, said:

"* * * corporations are not entitled to all the constitutional immunities and protections in private security which private individuals have in such matters. Hence, an officer of a corporation cannot refuse to produce its records in his possession, upon the plea *that they either will incriminate him or may incriminate it.*" (Emphasis added.)

The remaining question in this appeal is whether the commission erred in refusing to disqualify the chairman from participating in this matter.

The Public Utilities Commission is a creature of statute and is the only body in this state that can act in cases of this character. In matters involving public utilities it has exclusive jurisdiction. It is conceded that the General Assembly has not directed that any member of the commission shall disqualify himself under any circumstances and no provision is made in the statutes for the determination of the fact of disqualification. Nor is there a provision for a substitute to replace a commissioner if he should be disqualified because of bias or prejudice.

The General Assembly has acted with respect to the disqualification of judges for bias or prejudice. Section 2501.13, Revised Code, provides for the disqualification of a judge of a Court of Appeals; Section 2701.03, Revised Code, provides for the disqualification of a judge of a Court of Common Pleas; and Section 2937.20, Revised Code, provides for the disqualification of a magistrate or a judge of a court inferior to the Court of Common Pleas.

Not only has the General Assembly made specific provision for the disqualification of certain judges and magistrates but it has provided for the substitution of another judge or magistrate to hear a case when one is disqualified. In the light of this legislative action, it would seem that an argument that the commission has the implied power to determine whether one of its members is disqualified on the

ground of prejudice or bias must fail. If two members of the commission are to decide the disqualification of the third member, who will decide the disqualification of two members in the event affidavits of prejudice are filed against them? The argument can be made *ad absurdum*. As stated, in substance, in the brief of the commission, it may well be that there should be a provision for the disqualification of a member of the Public Utilities Commission on the ground of prejudice and bias. However, that is a question for the General Assembly.

A review of the matters relied upon by appellant as showing personal prejudice on the part of the chairman has not convinced this court that such prejudice existed. It indicates only a belief that action should be taken against motor transportation companies *if and when* they violate the laws of this state. This court can certainly not condemn an attitude such as that on the part of a chairman of a commission charged with the duty of supervision of motor transportation companies.

But assuming, for the sake of argument, that such prejudice existed we cannot say that it was prejudicial to the appellant. All three members of the Public Utilities Commission agreed on the facts in this case; the dissenting member differed only on the punishment. Even if the member alleged to have been prejudiced should not have participated, this court is of the opinion that the evidence before the commission amply supports the order it made.

For the reasons above stated, the orders of the Public Utilities Commission are affirmed.

Orders affirmed.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, STEWART and TAFT, JJ., concur.

APPENDIX B

Judgments of the Supreme Court of Ohio

Wednesday, July 20, 1955

OHIO TRANSPORT, INC., *Appellant*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee*.

APPEAL FROM THE PUBLIC UTILITIES COMMISSION OF OHIO

CASE NO. 34308

This cause came on to be heard upon the transcript of the Record of the Public Utilities Commission of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the order of the said Public Utilities Commission be, and the same hereby is, affirmed for the reasons stated in the opinion rendered herein.

ORDERED, That a special mandate be sent to the Public Utilities Commission of Ohio, to carry this Judgment into Execution.

Journal No. 41, Page No. 552.

The Supreme Court of Ohio

Wednesday, July 20, 1955

OHIO TRANSPORT, INC., *Appellant*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee*.

APPEAL FROM THE PUBLIC UTILITIES COMMISSION OF OHIO

CASE NO. 34309

This cause came on to be heard upon the transcript of the Record of the Public Utilities Commission of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the order of the said Public Utilities Commission be, and the same hereby is, affirmed for the reasons stated in the opinion rendered herein.

ORDERED, That a special mandate be sent to the Public Utilities Commission of Ohio, to carry this Judgment into Execution.

Journal No. 41, Page No. 553.

APPENDIX C

The Supreme Court of Ohio

Wednesday, September 28, 1955

OHIO TRANSPORT, INC., *Appellant,*

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee.*

Cases Nos. 34,308 & 34,309

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

Journal No. 41, p. 578
REHEARING DOCKET

APPENDIX D

Amendment XIV, Section I, to the Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 614-86, General Code (4921.04, Revised Code) (4921.05, Revised Code).

"The public utilities commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor transportation company in this state; to fix, alter and regulate rates; to regulate the service and safety of operation of each such motor transportation company; to prescribe safety regulations, and designate stops for service and safety on established routes; to require the filing of annual and other reports and of other data by such motor transportation companies; to provide uniform accounting systems; and to supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state, except as hereinafter otherwise provided. The commission, in the exercise of the jurisdiction conferred upon it by this chapter, shall have the power and authority to prescribe rules and regulations affecting such motor transportation companies, notwithstanding the provisions of any ordinance, resolution, license or permit enacted, adopted or granted by any incorporated city or village, city and county, or county, and in case of conflict between any such ordinance, resolution, license or permit, the order, rule or regulation of the public utilities commission shall in each instance, prevail; * * *."

Section 614-87, General Code (4921.10 Revised Code).

"No motor transportation company shall commence its operation as such in this state, without first obtaining from the public utilities commission a certificate declar-

ing that public convenience and necessity require such operation. * * *"

"The commission may at any time for a good cause and upon at least fifteen days' notice to the grantee of any certificate and (after granting)* an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this chapter. * * *"

Section 614-105, General Code (4923.03 Revised Code).

"The public utilities commission of Ohio is hereby vested with power and authority to supervise and regulate each such private motor carrier in this state; to prescribe reasonable safety rules; to prescribe reasonable rules and regulations for the administration and enforcement of the provisions of this chapter applying to each such contract carrier by motor vehicle in this state; to require the filing of such annual and other reports as the commission may prescribe; and to supervise and regulate the operation of such private motor carriers to the exclusion of all local authorities in this state except as hereinafter otherwise provided.

"In the exercise of the jurisdiction conferred upon it by this chapter, the commission shall have power and authority to prescribe rules and regulations affecting such private motor carriers, notwithstanding the provisions of any ordinance, resolution, license or permit enacted adopted or granted by any incorporated city or village, city and county, or county, and in case of conflict between any such ordinance, resolution, license or permit, the order, rule or regulation of the public utilities commission shall in each instance prevail; provided that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this act.

"And the commission is given jurisdiction to receive, hear and determine as a question of fact, upon complaint of any party or upon its own motion, and upon not less than fifteen days' notice of the time and place of such hearing and the matter to be heard, whether or not any corporation, company, association, joint stock association, person, firm or copartnership, their lessees, legal or personal representatives, trustees, receivers, or trustees appointed by any court whatsoever, is engaged as a private motor carrier, and the finding of the commission thereon shall be a final order

which may be reviewed as provided in Section 614-106 of the General Code."

Section 614-111, General Code (4923.03, Revised Code).

"After a permit has been issued to a private motor carrier and such carrier has paid the required taxes and complied with the terms of such permit and of the order granting the same, no change shall be made to substitute or to increase or decrease the number of or seating or carrying capacity of motor vehicles operated thereunder, or to substitute, increase or decrease the persons, firms or corporations with whom such carrier has contracts, nor shall any change or modification be made in any such contract or carriage, except upon notice to the commission, the payment of any additional taxes which may be due, the filing of any contract of carriage, change or modification thereof, and the approval of the same, as required by the provisions of this chapter and the rules of the commission, and the furnishing of the names and addresses of all persons, firms or corporations with whom such carrier has contracted and proposes to contract. * * *

"The commission may at any time for good cause and upon at least fifteen days' notice to the holder of any permit and (after granting)* an opportunity to be heard, revoke, suspend, alter or amend any permit issued under the provisions of this chapter."

Section 7246, General Code (5577.01 and 5577.02, Revised Code).

"No trackless trolley or traction engine or steam roller, and no other vehicle, load, object, or structure, whether propelled by muscular or motor power, not including vecles run upon stationary rails or tracks or fire engines, fire trucks or other vehicles or apparatus belonging to any municipal or volunteer fire department or used by such department in the discharge of its functions, shall be operated or moved over or upon the improved public streets and highways, bridges, or culverts in this state, upon wheels, rollers, or otherwise, weighing in excess of the weights prescribed in this chapter, including the weight of vehicle, object, structure or contrivance, and load, except upon special permission granted as provided by law.

"As used in this chapter, the following words and phrases shall be construed to mean as follows:

"(a) 'Axle' means the common axis of rotation of one or more wheels, whether power driven or freely rotating, and whether in one or more segments and regardless of the number of wheels carried thereon.

"(b) 'Spacing between axles' means the distance from axle center to axle center of any two successive axles.

"(c) 'Maximum axle load' means the gross weight of vehicle and load imposed by any axle upon the road surface.

"(d) 'Maximum wheel load' means the proportionate gross weight of vehicle and load imposed by any wheel upon the road surface."

Section 7248-1—General Code (5577.04, Revised Code).

"No vehicle, trackless trolley, load, object or structure shall be operated or moved upon the improved public highways and streets, bridges or culverts within this state, having a maximum axle load greater than sixteen thousand pounds when such vehicle is equipped with solid rubber tires, or greater than nineteen thousand pounds when such vehicle is equipped with pneumatic tires. The maximum wheel load of any one wheel of any such vehicle shall not exceed six hundred and fifty pounds per inch width of tire measured as prescribed by law, nor shall any solid tire of rubber or other resilient material on any wheel of any such vehicle be less than one inch thick when measured from the top of the flanges of the tire channel.

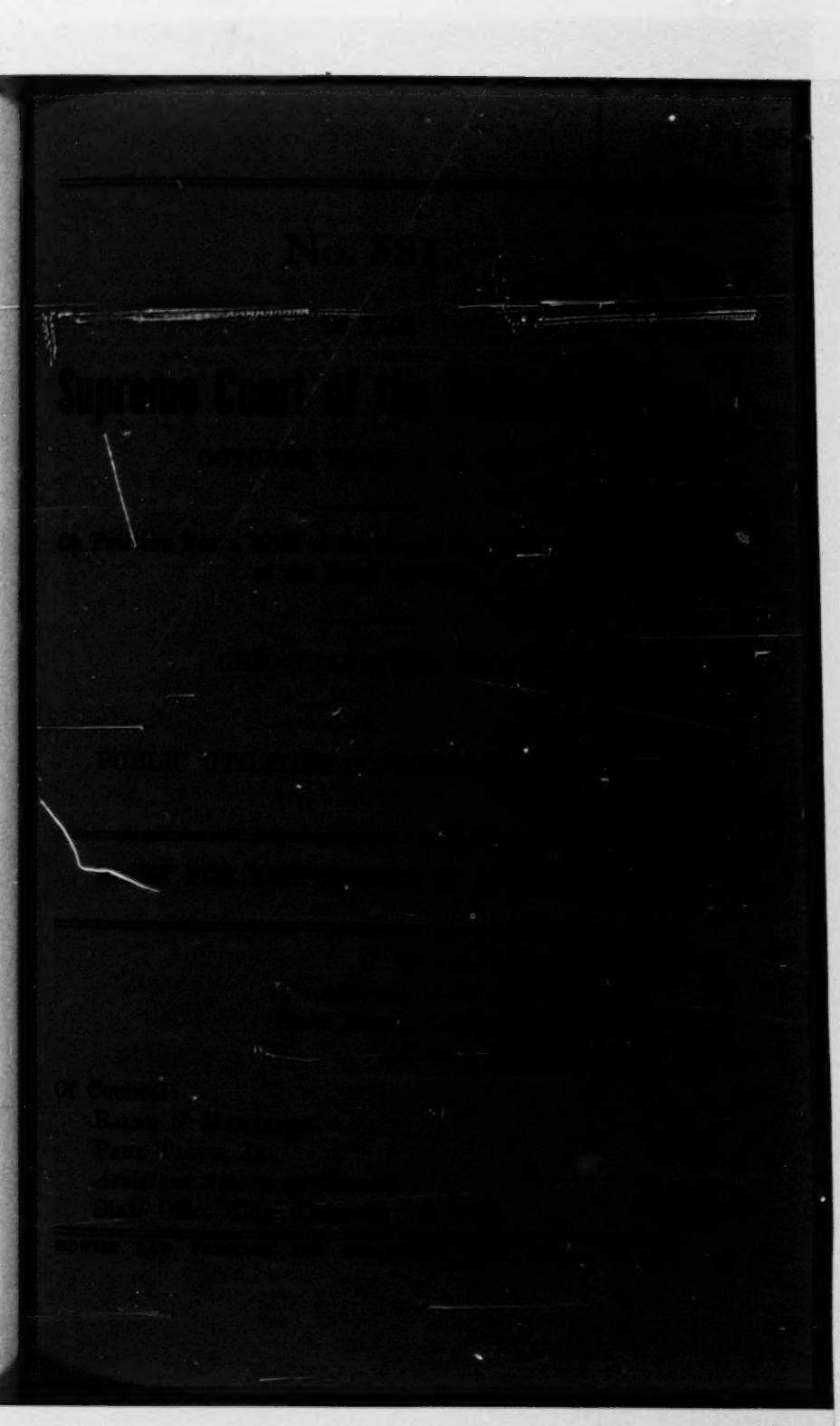
"The weight of vehicle and load imposed upon the road surface by any two successive axles, spaced four feet or less apart, shall not exceed, for solid tires, nineteen thousand pounds, nor exceed for pneumatic tires, twenty-four thousand pounds; or by any two successive axles, spaced more than four feet but less than eight feet apart, shall not exceed for solid tires, twenty-four thousand pounds, nor exceed for pneumatic tires, thirty-one thousand five hundred pounds, or by any two successive axles, spaced eight feet or more apart, shall not exceed, for solid rubber tires, twenty-eight thousand pounds, nor exceed, for pneumatic

tires, thirty-eight thousand pounds; nor shall the total weight of vehicle and load exceed, for solid rubber tires, twenty-eight thousand pounds plus an additional six hundred pounds for each foot or fraction thereof of spacing between the front axle and the rearmost axle of the vehicle, nor exceed, for pneumatic tires, thirty-eight thousand pounds plus an additional eight hundred pounds for each foot of spacing between the front axle and the rearmost axle of the vehicle, nor shall the weight of vehicle and load imposed upon the road surface by any vehicle exceed, for pneumatic tires seventy-eight thousand pounds; nor shall such weight of vehicle and load exceed, for solid tires, eighty per cent of the permissible weight of vehicle and load as provided for pneumatic tires. In this section the word vehicle shall mean any single vehicle when not in combinationfi or any combination of vehicles, as defined in Section 6290 of the General Code."

Section 7250-1, General Code (5577.99, Revised Code).

"Whoever violates the weight provisions of Sections 7246 to 7250, inclusive, of the General Code of Ohio, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined twenty-five dollars for the first two thousand pounds, or fraction thereof, of overload; for overloads in excess of two thousand pounds but not in excess of five thousand pounds he shall be fined twenty-five dollars and in addition thereto one dollar per one hundred pounds of overload; for overloads in excess of five thousand pounds, but not in excess of ten thousand pounds, he shall be fined twenty-five dollars and in addition thereto two dollars per one hundred pounds of overload, or imprisoned in the county jail or workhouse not more than thirty days, or both. For all overloads in excess of ten thousand pounds he shall be fined twenty-five dollars and in addition thereto three dollars per one hundred pounds of overload, or imprisoned in the county jail or workhouse not more than thirty days, or both; provided, however, that whoever violates the weight provisions of vehicle and load relating to gross load limits shall be fined not less than one hundred dollars. Whoever violates any other provisions of Sections 7246 to 7250, inclusive, of the General Code of Ohio, shall be deemed guilty of a misdemeanor and upon conviction thereof shall, for the first offense, be fined not more than

twenty-five dollars; and for the second offense within one year thereafter, not less than ten dollars nor more than one hundred dollars, or imprisoned in the county jail or workhouse not more than ten days, or both; and for a third or subsequent offense within one year after the first offense shall be fined not less than twenty-five dollars nor more than two hundred dollars, or imprisoned in the county jail or workhouse not more than thirty days, or both."



INDEX.

Opinions below 1
Jurisdiction 2
Questions presented 6
Statement of the case 6
Argument 8
Conclusion 13

Cases Cited.

Bowe v. Scott, 233 U. S., 658, 663..... 5
Brinkley v. Hassig, 83 Fed. 2d, 351..... 11
Capital City Dairy Co. v. Ohio, 183 U. S., 238, 248..... 5
C. I. O. v. McAdory, 325 U. S., 472, 477..... 5
Cincinnati v. P. U. C. O., 151 Ohio St., 353, 86 N. E. 2d, 10 .....3, 5
C. & O. Ry. Co. v. McDonald, 214 U. S., 191..... 5
Federal Trade Commission v. Cement Institute, 333 U. S., 683 10
Georgia Continental Telephone Co. v. Georgia Public Service Commission, 8 F. Supp., 434..... 11
Herndon v. Georgia, 295 U. S., 441, 443..... 5
Ison v. Western Vegetable Distributors, 48 Ariz., 104, 59 P. 2d, 649..... 11
John v. Paullin, 231 U. S., 583..... 5
Live Oak Assn. v. Railroad Commission of California, 269 U. S., 354, 358-9 4
Loughram v. Federal Trade Commission, 143 F. 2d, 431 11
Lynch v. New York, ex rel. v. Pierson, 293 U. S., 52, 54. 4

Moran v. School Committee, 317 Mass., 591, 59 N. E. 2d, Morgan v. United States, 304 U. S., 1 10
Montana Power Co. v. Public Service Commission, 12 F. Supp., 946 11
Nova Telephone Co. v. P. U. C. O., 164 Ohio St., 238, 244, 130 N. E. 2d, 91, 95 ..... 3, 5
Ohio Bell Telephone Co. v. P. U. C. O., 301 U. S., 292 ... 10
Radio Station WOW, Inc., v. Johnson, 326 U. S., 120, Rawlings v. City of Newport, 275 Ky., 183, 121 S. W. 2d, 10 12
State, ex rel. Mueller, v. District Court, 87 Mont., 108, 285 Pac., 928 11
Thomas v. Iowa, 209 U. S., 258, 263 5
279 12
Turney v. Ohio, 273 U. S., 510 12
Wisconsin Telephone Co. v. Public Service Commission, 232 Wis., 274, 287 N. W., 121 11
Zadig v. Baldwin, 166 U. S., 485, 488 4
128 5
Zober v. Turner, 106 N. J. L., 86, 148 Atl., 894 12

Text Cited.

42 Am. Jur., 479 10

Statutes Cited.

Revised Code of Ohio—
Section 4903.10 2
Section 4921.10 8
Section 4923.14 8
Sections 5577.02 and 5577.04 6
U. S. Constitution, Fifth and Fourteenth Amendments. 2, 4
Ohio Constitution, Article I, Sections 5 and 10 4

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 581.

OHIO TRANSPORT, INC.,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The finding and order of the Public Utilities Commission of Ohio revoking the contract carrier permit of the petitioner is reported in 7 P. U. R. 3d, 275. The finding and order of the Public Utilities Commission of Ohio revoking the intrastate irregular certificate of the petitioner

is not reported. The opinion of the Supreme Court of Ohio in both cases (App. A of petition) is reported in 164 Ohio St., 98, and 128 N. E. 2d, 22.

JURISDICTION.

Petitioner asserts that the judgment of the Supreme Court of Ohio violates the due process of law clause of the Fourteenth Amendment of the Constitution of the United States. The petition states, at pages 2 and 3, that the two federal questions presented by it were raised several times in previous stages of these proceedings. However, an examination of the exact manner in which the petitioner claims the federal questions were raised reveals that it is extremely doubtful whether the questions were raised in a manner proper to give this court jurisdiction.

With respect to the question of whether the respondent had jurisdiction to consider violations of the weight and load limit statutes, it was said, in the oral argument in support of the motion to dismiss the citations, that this action by the commission would be "unconstitutional and void" (R., 56, 57).

With respect to the second question, counsel for the petition said, in the oral argument before the commission, that the failure to disqualify the chairman would deprive it of "due process of law guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States" (R., 8). It was also said that the petitioner was guaranteed the right of a fair trial and due process of law by the Constitution of the United States and the state of Ohio (R., 12, 26).

Section 4903.10, Revised Code of Ohio, provides for an application for rehearing of an order of the Public Utilities Commission. This section provides, in part:

> "Such application shall be in writing and shall set forth specifically the ground or grounds on which the

applicant considers said order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation or modification not so set forth in said application."

The Supreme Court of Ohio will not consider any question which was not specifically set forth in an application to the commission for a rehearing. *Cincinnati v. Public Utilities Commission,* 151 Ohio St., 353, 86 N. E. 2d, 10. Such specification of error must also be set forth in the notice of appeal to the Supreme Court of Ohio. *Nova Telephone Company v. Public Utilities Commission,* 164 Ohio St., 238, 244, 130 N. E. 2d, 91, 95.

In the applications for rehearing filed with the respondent the petitioner stated (Par. 1, 17 P. U. C., Tr. p. 124 in No. 34308, and par. 1, 16 P. U. C. Tr. p. 95 in No. 34309):

"The Commission erroneously failed, refused and neglected to sustain Citee's motion of prejudice to disqualify Chairman Moulton 'from sitting in, presiding over, in any manner considering the evidence, making any decisions, or participating in these proceedings'. This failure to sustain Citee's said motion constituted prejudicial error and subjected Citee to a denial of due process of law, guaranteed by the Ohio and Federal Constitutions."

"The Commission erred in assuming the powers of a court of competent jurisdiction, when it determined the Citee had been guilty of violations of an unrelated criminal statute, over which the General Assembly has refused to give this Commission jurisdiction of the enforcement thereof, and as a result thereof the Citee has been denied due process of law, including the right of a trial by jury as guaranteed by the Ohio and Federal Constitutions."

The petitioner's notice of appeal to the Supreme Court of Ohio and the assignments of errors in that court used the same language as that set forth in the paragraphs

quoted above, except that the petitioner was referred to as "appellant" as well as "citee."

In petitioner's brief in the Ohio court it was said that an attempt by an administrative agency to expand its authority beyond that expressed in legislative enactments was "unconstitutional and void". In the argument in petitioner's brief on the question involving prejudice it was urged that petitioner was "entitled to the protection of his common law and constitutional rights," and that the "right to a fair trial by an impartial tribunal is guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as Sections 5 and 10 of Article I of the Ohio Constitution." However, matters set forth in the briefs before state courts cannot, by themselves, be used to establish that a federal question was raised. *Zadig v. Baldwin,* 166 U. S., 485, 488; *Live Oak Association v. Railroad Commission of California.* 269 U. S., 354, 358-9; *Lynch v. New York ex rel. v. Pierson,* 293 U. S., 52, 54.

In petitioner's application for rehearing in the Supreme Court of Ohio it was contended that the court's decision deprived petitioner "of the right of trial by jury, which right would have been available to it in a court of law of competent jurisdiction and as guaranteed to it by the Ohio and Federal Constitutions," and constituted "a clear denial of due process of law which has been guaranteed by the Ohio and Federal Constitutions." The petitioner also contended that it had been denied the right to a fair trial by an impartial tribunal guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and by Sections 5 and 10 of Article I of the Ohio Constitution. Of course it is well established that, generally, an attempt to raise a federal question upon an application for rehearing of the decision of the highest state court comes too late for consideration by this court.

Radio Station WOW, Inc., v. Johnson, 326 U. S., 120, 128; *Herndon v. Georgia,* 295 U. S., 441, 443; *Bowe v. Scott,* 233 U. S., 658, 663.

It should also be noted that the Supreme Court of Ohio made no reference to any federal question in the opinion or in the syllabus in this case. Petitioner, in its applications for rehearing of the respondent's orders, in its notices of appeal to the Supreme Court of Ohio and assignments of errors filed in that court, did not specify a particular clause of the Constitution of the United States, as required by the statutes of the state of Ohio. *Cincinnati v. Public Utilities Commission, supra; Nova Telephone Company v. Public Utilities Commission, supra.* When review of a judgment of a state court involving a federal question is sought in this court it is necessary that the federal question shall have been presented to the state court in the proper manner in accordance with the state practice. *Chesapeake & Ohio Railway Company v. McDonald,* 214 U. S., 191; *John v. Paullin,* 231 U. S., 583; *C. I. O. v. McAdory,* 325 U. S., 472, 477.

It seems clear that the petitioner did not seasonably specify a particular clause of the Constitution of the United States, and that it was not sufficiently definite in asserting its claimed rights under the due process clause of the Fourteenth Amendment to give this court jurisdiction now to consider the asserted federal questions. *Herndon v. Georgia,* 295 U. S., 441, 443; *Thomas v. Iowa,* 209 U. S., 258, 263; *Capital City Dairy Company v. Ohio,* 183 U. S., 238, 248.

QUESTIONS PRESENTED.

(1) Did the orders of the Public Utilities Commission of Ohio, affirmed by the Supreme Court of Ohio, finding that violations of the weight and load limit statutes of Ohio were "good cause" for the revocation of the permit and the certificate of the petitioner deprive the petitioner of its rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

(2) Did the order of the Public Utilities Commission of Ohio, affirmed by the Supreme Court of Ohio, dismissing the motion of the petitioner to disqualify the chairman of the commission on the ground that he was biased and prejudiced deprive the petitioner of its rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE.

The petitioner is a carrier of property by motor vehicle in intrastate commerce within the state of Ohio. At the time of the hearings in these proceedings before the respondent commission, the petitioner was the holder of Contract Permit No. 3066 and Irregular Certificate No. 3975, theretofore issued to the petitioner by the respondent commission.

On September 11, 1953, the respondent issued two separate citations against the petitioner ordering it to show cause why the authority theretofore granted by the permit and certificate should not be suspended or revoked because of alleged violations of the weight and load limit statutes of Ohio, Sections 7246 and 7248-1, General Code of Ohio (Sections 5577.02 and 5577.04, Revised Code of Ohio) (App. D, pp. 19-21 of petition), during portions of the period

from January 1, 1952, to August 1, 1953. Attached to each citation was an exhibit which specifically identified the alleged violations.

Prior to the hearing, petitioner filed a motion to disqualify the chairman of the commission from participating in the proceedings, on the ground that the chairman was prejudiced and biased against petitioner, as evidenced by his statements to the public press (P. U. C. Tr. pp. 52-53 in No. 34308 and pp. 29-30 in No. 34309). After a hearing before the other two members of the commission the motion to disqualify the chairman was dismissed for the reason that the commission had no statutory authority to disqualify a member of the commission.

After a hearing before an attorney examiner on the citations the commission entered orders in both cases, revoking the permit and the certificate of the petitioner. In the permit case the commission found that there were 891 loads transported by the petitioner during the period covered by the citation where the gross weight exceeded 78,000 pounds, the maximum permitted under the laws of the state of Ohio. In the certificate case the commission found that there were 150 loads transported by the petitioner where the gross weight exceeded the maximum weight limit.

ARGUMENT.

The questions presented by the petition in the instant case involve questions of state law. Construction of the Ohio statutes pertaining to the authority of the Public Utilities Commission of Ohio would seem to present questions the final decision of which is vested in the Supreme Court of Ohio.

No federal question of substance is presented by the petition. There is no showing, or attempt to show, that the decision below is in conflict with any decision of this court or any principle of federal law. The basic theme of the petition is that the decision of the Supreme Court of Ohio is erroneous. Even if this reason were correct, which it is not, it would not be sufficient for the granting of the writ of certiorari by this court.

(1) Sections 4921.10 and 4923.14, Revised Code of Ohio (App. D, pp. 17-19, of petition) provide that the Public Utilities Commission may, for good cause, upon at least fifteen days' notice to the holder, and after granting an opportunity to be heard, revoke, suspend, alter, or amend any permit or certificate issued by it to a private motor carrier or a motor transportation company. The question of whether violations of the weight and load limit statutes constitute "good cause" within the meaning of the above statutes for the revocation of a permit or a certificate involves no question of federal law.

Petitioner's argument is that the General Assembly of Ohio has not authorized the respondent commission to revoke or suspend a certificate or a permit for repeated violations of the weight and load limit statutes. Petitioner concedes that the Ohio legislature has the power to authorize the respondent to revoke or suspend a certificate or

permit for such violations. If the legislature of Ohio has this power, which it does, the question of whether it has authorized the commission to take such action is a question of the construction of the Ohio statutes rather than a constitutional question. The decision of the Supreme Court of Ohio is based solely on its construction of the statutes.

The petition stresses the fact that a violation of the weight and load limit statutes of Ohio is a criminal offense. An argument based on this fact ignores the true nature of these proceedings before the commission. The respondent commission has the sole power to license a common or contract carrier to transport property in intrastate commerce over the highways of Ohio. The commission was concerned with the question of whether the petitioner was a fit and proper party to continue to enjoy the privilege of a license from the commission. No criminal sanctions were imposed, or sought to be imposed, against the petitioner.

(2) The respondent commission dismissed the motion to disqualify the chairman on the ground it had no authority to disqualify one of its members. The opinion of the Supreme Court of Ohio points out that there is no statute directing that any member of the commission shall disqualify himself, that no provision is made for the determination of the fact of disqualification, and that there is no provision for a substitute to replace a commissioner if he should be disqualified because of bias or prejudice. These reasons were the basis of the decision of the court below.

The petitioner claims that the respondent had inherent power to disqualify one of its members for bias and prejudice and that the failure to disqualify the chairman in the instant case deprived it of due process of law. Two decisions of this court are cited in the petition, at page 11,

following a quotation from 42 *American Jurisprudence,* 479. In one of these cases, *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U. S., 292, it was held that the commission deprived the company of the fair hearing essential to due process when it based its order upon the strength of evidential facts not contained in the record. In the other case, *Morgan v. United States,* 304 U. S., 1, this court held a regulation of the secretary of agriculture invalid because a fair and open hearing was not held. In the opinion in the latter case, it is said, at pages 18 and 19:

> "* * * But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

In the instant proceeding, petitioner was certainly afforded an opportunity to know the charges against it, and to present evidence to rebut the charges. In fact, *all* of the evidence upon which the citations were predicated was given to the petitioner months before the hearing.

We do not challenge the vitality of the above decisions. This case presents an entirely different situation. The decision of the Supreme Court of Ohio on the question involving prejudice is in accord with principles announced by this court and the lower federal courts.

In the case of *Federal Trade Commission v. Cement Institute,* 333 U. S., 683, one of the questions presented arose

out of the failure of the commission to disqualify itself from passing upon the issues involved, when one of the respondents charged that the commission had previously prejudged the issues and was "prejudiced and biased against the Portland cement industry generally." This court held that the commission properly refused to disqualify itself, even though it was assumed that the entire membership of the commission had formed the opinion that the practice in question was illegal. In the court's opinion, by Mr. Justice Black, it was said, 333 U. S., 701:

> "Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other governmental agency. Congress has provided for no such contingency. It has not directed that the commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices."

Accord: *Loughram v. Federal Trade Commission,* 143 F. 2nd, 431; *Brinkley v. Hassig,* 83 F. 2d, 351; *Montana Power Co. v. Public Service Commission,* 12 F. Supp., 946; *Georgia Continental Telephone Co. v. Georgia Public Service Commission,* 8 F. Supp., 434.

The decision of the court below is also in accord with the principles set forth in the decisions of the highest courts in other states. *Wisconsin Telephone Company v. Public Service Commission,* 232 Wis., 274, 287 N. W., 121; *State, ex rel. Mueller, v. District Court,* 87 Mont., 108, 285 Pac., 928; *Ison v. Western Vegetable Distributors,* 48 Ariz., 104,

59 P. 2d, 649; *Moran v. School Committee,* 317 Mass., 591, 59 N. E. 2d, 279; *Zober v. Turner,* 106 N. J. L., 86, 148 Atl., 894; *Rawlings v. City of Newport,* 275 Ky., 183, 121 S. W. 2d, 10.

A part of the opinion in the case of *Tumey v. Ohio,* 273 U. S., 510, by Chief Justice Taft, is pertinent to the consideration of the instant matter. It was said, at page 523:

> "All questions of judicial qualification may not involve constitutional validity. Thus *matters of* kinship, *personal bias,* state policy, remoteness of interest *would seem generally to be matters merely of legislative discretion.*" (Emphasis added.)

If matters of personal bias would seem generally to be matters merely of legislative discretion, the Supreme Court of Ohio would be the final authority on the question of whether the legislature of Ohio had provided for the disqualification of a member of the Public Utilities Commission.

It should also be noted that the Supreme Court of Ohio gave consideration to the question of whether the chairman of the respondent commission was prejudiced against the petitioner. In the opinion, by Judge Bell, it is said, 164 Ohio St., 108, 128 N. E. 2d, 29, App. A, p. 13, of petition:

> "A review of the matters relied upon by appellant as showing personal prejudice on the part of the chairman has not convinced this court that such prejudice existed. It indicates only a belief that action should be taken against motor transportation companies *if and when* they violate the laws of this state. This court can certainly not condemn an attitude such as that on the part of a chairman of a commission charged with the duty of supervision of motor transportation companies."

From the above it may fairly be concluded that the petition does not present any federal constitutional question.

The decision of the Supreme Court of Ohio does not deprive the petitioner of any constitutional right and is not in conflict with any decision of this court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

C. William O'Neill,
Attorney General of Ohio,
State House, Columbus 15, Ohio,
Attorney for Respondent.

Of Counsel:
Ralph N. Mahaffey,
Paul Tague, Jr.,
Assistant Attorneys General,
State Office Bldg., Columbus 15, Ohio.